Office - Supreme Court, U. S.
FILED
NOV 30 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 711

THE AETNA CASUALTY AND SURETY COMPANY,
a corporation,
Petitioner,

vs.

KISHWAUKEE SPECIAL DRAINAGE DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

DEGOY B. ELLIS,
PAUL M. HAMILTON,
Attorneys for Petitioner,
16 N. Spring Street,
Elgin, Illinois.

FRANZ W. CASTLE,
Of Counsel,
111 West Washington Street,
Chicago, Illinois.

UNITED STATES LAW PRINTING CO. PHONE LAKEVIEW 6561 CHICAGO, ILL.

SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1
Summary Statement of Matters Involved	1
Summary of Facts	2
Jurisdictional Statement	5
Reasons relied on for Allowance of Writ	6
Specification of Errors	7
Prayer for Writ	8
Brief in Support of Petition for Certiorari	9
Opinions of the Court below	9
Jurisdiction	10
Statement of the Case	10
Specification of Errors	10
Argument	11
Summary of Argument	11
Point A	11
Point B	13
Point C	14
Point D	16
Conclusion	21

Page

Table of Cases Cited

Aetna Casualty & Surety Co. v. Kishwaukee Special Drainage Dist., 143 Fed. (2d) 471 8

Amer. Surety Co. v. Bethlehem Bank, 314 U. S. 317 6

Amer. Surety Co. v. Robinson, 53 Fed. (2d) 22 13

Bates v. Drainage Commissioners, 273 Ill. App. 335 ....14, 17

Board of Commissioners v. Platt, 79 Fed. 567 .....15, 16

Bradbury v. Vandalia Drainage Dist., 236 Ill. 36 .....14, 17

City of Cairo v. Campbell, 116 Ill. 305 15

Danner v. Highway Commissioners, 278 Ill. 189 15

Farrow v. Eldred Drainage & Levee Dist. 359 Ill. 347 .....14, 15, 17

Forsythe v. Hammond, 166 U. S. 506, 41 L. Ed. 1095; 17 Sup. Ct. Rep. 665 5

Harmon v. Auditors of Public Accts., 123 Ill. 122 15

Moore v. Town of Browning, 373 Ill. 583 15

People v. Village of Bradley, 367 Ill. 301 15

Rothschild v. Village of Calumet Park, 350 Ill. 330 15

Turner v. Hunt Drainage Dist., 87 Fed. (2d) 167 18

United States v. Bd. of Town Auditors, 28 Fed. 407 ....15, 16

Wilcoxen v. Eldred Drainage & Levee Dist., 365 Ill. 249 .....14, 17, 19

Page

TABLE OF STATUTES CITED.

Section 240 (a) U. S. Judicial Code (U. S. C. A. Vol. 8, Table 28, Chap. 9, Sec. 347) 5

Smith-Hurd Illinois Statute Chap. 42, Sec. 136 14

TABLE OF TEXT BOOKS AND ENCYCLOPEDIAS CITED.

Am. Juris. Vol. 50 6

Corpus Juris Vol. 60 6

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

NO.

THE AETNA CASUALTY AND SURETY COMPANY,
a corporation,
Petitioner,

vs.

KISHWAUKEE SPECIAL DRAINAGE DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Aetna Casualty and Surety Company, your Petitioner, respectfully shows:

I.

SUMMARY OF THE MATTERS INVOLVED.

This is a suit in equity filed in the District Court by the Petitioner herein against the Respondent.

The original Complaint filed in this cause was a bill in equity in the nature of a Creditor's Bill and in aid of Execution (Rec. 2). By leave of Court an Amended Complaint was filed designated as Count II (Rec. 12). By the Amended Complaint, Petitioner sought to recover from Respondent, by way of subrogation to the claims of certain judgment creditors of Respondent, for the amount Petitioner was required to pay as surety on the official bond of the Treasurer of Respondent, on account of the wrongful diversion of funds in the custody of said Treasurer, to the payment of the claims of said judgment creditors.

II.

SUMMARY OF FACTS.

The Respondent, Kishwaukee Special Drainage District, hereinafter referred to as the District, was organized in 1906 under the provisions of the Illinois Statute, Chapter 42, known as the "Farm Drainage Act", Sec. 134, et seq.

The territory comprising the District is located in DeKalb County, in the vicinity of the City of Sycamore, the County Seat.

Under the provisions of said Act the County Clerk is ex-officio Clerk of the District, and the County Treasurer is ex-officio Treasurer thereof, and the affairs of the District are conducted by three Commissioners elected by the landowners. Such a District is organized by the voluntary petition of a majority of the adult land owners in the proposed district, who shall be the owners in the aggregate of more than one-third of the lands within said proposed district.

Under said Act a Drainage District, when so organized, shall be a body corporate and may sue and be sued.

In 1908 the Respondent District issued special assessment Bonds in the sum of $27,000.00, which were sold by the District.

In March 1923 William D. Masterson and others, holders of the balance of the unpaid bonds of the issue of 1908, recovered judgments in the Circuit Court of DeKalb County against the Respondent District, for various sums aggregating $16,024.20 (Rec. 27). Certified transcripts of these judgments were attached to the Motion for Summary Judgment, as Exhibits 1 to 7, both inclusive (Rec. 31 to 42, inc.). These judgments will be hereafter referred to as the Masterson judgments.

On October 15, 1923, pursuant to a resolution recorded on the records of said District, the Commissioners of said District issued special assessment bonds in the aggregate sum of $16,000.00 for the alleged purpose of making repairs on the works of said District, and the same were sold to Adamson and others, and are referred to herein as the Adamson bonds. The funds derived from the sale of these bonds were unlawfully diverted to the payment of the Masterson judgments.

In 1929 the Adamson bond holders filed a suit in the U. S. District Court against the Commissioners, Treasurer, and the District, to establish a trust on account of the funds paid into the Treasury of the District as the proceeds of the 1923 bonds, and to impress a trust on any funds in the hands of the Treasurer from the special assessments levied and collected and then in the hands of the Treasurer, on account of said bond issue of 1923. The basis of said suit

was the unlawful diversion of the trust funds, being proceeds of the 1923 bonds, to the payment of the Masterson judgments, instead of said funds being used in making repairs on the works of said District as provided in the resolution under which the same were issued.

As the result of said suit and a subsequent suit filed against the Petitioner, as surety on the bond of William Decker, Treasurer of said District, judgment was rendered against the Petitioner for $18,758.06, which was paid October 12, 1934 (Rec. 43).

On November 25, 1938 an amendment to the original Bill of Complaint was filed, designated as Count II (Rec. 12), by which the Petitioner sought re-imbursement by way of subrogation to the claims of the Masterson judgment creditors, obtained against the Respondent in the Circuit Court of DeKalb County, and which were paid by the illegal diversion of funds obtained by the District from the sale of the 1923 bonds, which in the litigation which followed were held to have been illegally issued and sold. It was charged that as a direct result of said illegal diversion of funds the Petitioner was held liable as surety on the bond of the Treasurer.

The Findings of Fact and Conclusions of Law were entered by Chancellor Woodward April 16, 1942 (Rec. 60 to 63). Before the entry of the Judgment or Decree on the Findings, Chancellor Woodward died and the cause was transferred to Mr. Justice Campbell, who entered final Judgment or Decree in conformity with the Findings and Conclusions of Chancellor Woodward on April 16, 1943 (Rec. 205-6) granting the relief prayed for in the Amendment designated as Count II of the Complaint.

The Respondent was adjudged and decreed to pay to the Petitioner $22,913.24, and in the event it did not have sufficient funds on hand from which to make such payment, or any part thereof, to levy a Special Assessment against the lands within said Respondent District to pay the same.

From that Judgment or Decree an appeal was taken to the Circuit Court of Appeals, where the same was reversed (Rec. 243). Dissenting Opinion by Mr. Justice Evans (Rec. 250). (143 Fed. (2d) 471.)

A Petition for re-hearing was filed on July 1, 1944 (Rec. 256). On July 17, 1944 said Petition for re-hearing was denied (Rec. 257).

By this Petition a review is sought of the Judgment last mentioned.

The Opinions of the Circuit Court of Appeals (Rec. 243-255) are reported in 143 Fed. (2d) 471.

III.

Jurisdiction.

(1) The date of the Judgment or Decree sought to be reviewed was May 20, 1944 (Rec. 255-6). Petition for re-hearing denied July 17, 1944 (Rec. 257). Time for filing Petition for Certiorari extended by this Court to December 1, 1944.

(2) The Statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) Judicial Code (U. S. C. A. Vol. 8, Title 28, Chap. 9, Sec. 347) providing for the granting of Writ of Certiorari by this Court to review a final judgment or decree by the Circuit Court of Appeals of the United States. See also *Forsyth*

v. *Hammond*, 166 U. S. 506; 41 L. Ed. 1095; 17 Sup. Ct. Rep. 665.

IV.

Reasons Relied On For Allowance Of Writ.

(1) The majority opinion of the Circuit Court of Appeals (Rec. 243) held that the important and controlling questions involved were: "(1) Was plaintiff entitled to be subrogated to the rights of the Masterson judgment creditors? and (2) Even so, was it as such subrogee entitled to a judgment, satisfaction of which could be forced by a special assessment levy?"

Both of these questions were answered in the negative. In the dissenting opinion of Mr. Justice Evans, the first was answered in the affirmative.

(a) The holding of the lower Court on the first question appears to be in conflict with the general rule as to the right to subrogation announced in 60 Corpus Juris pages 698-699, Sec. 6; pages 728-729, Sec. 37; page 740, Sec. 49; page 763, Sec. 63; 50 Am. Juris. pages 683-685; *Amer. Surety Co.* v. *Bethlehem Bank*, 314 U. S. 317.

(b) The decision of the lower Court as to the second proposition appears to be in conflict with numerous decisions of the Illinois Supreme Court, and of the Federal Courts which will be cited and commented upon in the Argument.

(c) The effect of the decision of the lower Court is to sanction the collateral attack on the Masterson judgments, contrary to the great weight of authority.

This will result in great confusion as to the rights of a judgment creditor to enforce a judgment against a drainage district, and is in conflict with the decisions of the Supreme Court of Illinois on that subject, as will be pointed out in the Argument.

V.

Specification Of Errors.

(1) That the Court erred in holding that the rights of the Petitioner to be subrogated to the claims of the Masterson judgment creditors was determined in the suit of Adamson bond holders against the Respondent in the U. S. District Court (Cause 9306) Rec. 245-246.

(2) That the Court erred in holding that the Petitioner was not entitled to be subrogated to the claims of the Masterson judgment creditors.

(3) That the Court erred in holding that even though the Petitioner was entitled to be subrogated to the claims of said judgment creditors, still, the Petitioner could not enforce said judgments against the Respondent District.

(4) The Court erred in holding that the validity of the Masterson judgments could be attacked in this collateral proceeding.

(5) The Court erred in holding that no valid special assessment could be levied against the lands in the Respondent District to pay the Masterson judgments.

(6) The Court erred in holding that the judgment of the District Court directing the levy of a special assessment against the lands of said District was invalid.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals, Seventh Circuit, commanding said Court to certify and send to this Court, a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals, had in the case numbered and entitled on its docket No. 8406, *The Aetna Casualty and Surety Company, Plaintiff, Appellee,* v. *The Kishwaukee Special Drainage District, Defendant, Appellant,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to the Court may seem proper.

Dated .....

DEGOY B ELLIS,
PAUL M. HAMILTON,
Attorneys for Petitioner,
16 N. Spring Street,
Elgin, Illinois.

FRANZ W. CASTLE,
Of Counsel,
111 West Washington Street,
Chicago, Illinois.